FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

JUN 16 1981

SECRETARY OF LABOR, MINE SAFETYANDHEALTH ADMINISTRATION (MSHA), ex rel THOMAS ROBINETTE, Applicant	Complaint of Discharge, Discrimination, or Interference
v.	Docket No. VA 79-141-D
UNITED CASTLE COAL COMPANY, Respondent	

DECISION ON REMAND

Appearances: James H. Swain, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Applicant; Michael L. Lowry, Esq., Ford, Harrison, Sullivan, Lowry & Sykes, Atlanta, Georgia, for Respondent.

Before: Chief Administrative Law Judge Broderick

On April 3, 1981, the Commission remanded this case for a determination as to "whether [Complainant] Robinette would have been fired for his unprotected activity alone." Corn. Dec. at 17-18. The parties were ordered to file briefs on the issue, and were given the opportunity to offer additional evidence. The Secretary of Labor filed a brief, but Respondent stated that it was in receivership and unable to afford the expense of filing a brief. Neither party sought to introduce additional evidence.

The evidence shows that there were a number of factors involved in Respondent's decision to discharge Robinette. He allowed his cap cord to be severed, he shut down the belt conveyor, he disconnected the mine phone, he failed to grease the feeder, he permitted a miner to run through and destroy a line curtain while working as a miner-helper, and on a number of occasions he generally neglected his-duties. Of these factors, I found the shutting down of the belt conveyor to be activity protected under § 105(c). This was not cited by Respondent as a reason for discharging Robinette, but the Commission found as I did that it played a role in the discharge. Corn. Dec. at 16. The Commission further found that Robinette had engaged in unprotected activities which were involved in the decision to discharge him. The Commission characterized the act of disconnecting the phone as "a flagrant disregard of mine safety." Corn. Dec. at 17.

Respondent has the burden of proving by a preponderance of all the evidence that it would have fired Robinette solely because of the unprotected activities. Secretary of Labor ex rel Pasula v. Consqlidation Coal Co., 2 FMSHRC 2786, 2800 (1980).

> It is not sufficient for the employer to show that the miner deserved to have been fired ... The employer must show that he did in fact consider the employee deserving of discipline for engaging in the unprotected activity alone and that he would have disciplined him in any event.

Pasula, supra. 1/ See also Wright Line, 251 N.L.R.B. 150, 105 LRRM 1169 (1980).

Percy Sturgill, section foreman, testified that on May 30 Robinette worked on the belt feeder and that part of his job was to grease the tailshaft. On May 31 the feeder tailshaft broke and Sturgill concluded that this was caused by failure to grease it the previous day. Sturgill remonstrated with Robinette about this failure. On May 31, while Robinette was working as a miner-helper, the miner ran through and destroyed a line curtain. Sturgill blamed this incident on Robinette. These incidents figured in Respondent's decision to discharge him on June 4.

At the time of the cap lamp incident, Sturgill testified that he saw Robinette disconnect the mine phone. He had a discussion with Robinette concerning the feeder being shut down, and Robinette's light being out. Although he did not discuss the phone incident until after Robinette returned from shovelling spillage on the beltline, it is clear that the phone incident was also involved in Respondent's decision to discharge Robinette.

On the present record, it is difficult to decide whether Respondent would have fired Rdbinette solely for the acts and omissions described in the prior two paragraphs because it obviously involves a hypothetical set of circumstances. It is clear,. however, that shutting down production (which I found to be protected and the Commission affirmed) was the final act or event for which he was fired. Using a test recently employed by the NLRB,

> [I]n those instances where after all the evidence has been submitted, the employer has been unable to carry its burden, [I] will not seek to quantitatively analyse the effect of the unlawful cause once it has been found. It is enough that the employee's protected activities are causally related to the employer action which is the basis for the complaint whether that "cause" was the straw that broke the camel's back or a bullet between the eyes, if it was enough to determine events, it is enough to come within the proscription of the Act.

Wright Line, 105 LRRM at 1175 n. 14.

1/ But cf. Texas Dept. of Community Affairs v. Burdine, U.S. , 25 PEP Cases 113 (1981), a case brought under Title VII of the Civil Rights Act.

The protected activities here were what "determined the event" - Robinette's discharge - and this is what I meant in the conclusion in my prior decision that the protected activities were the "effective cause" of the discharge.

I conclude that Respondent has not carried its burden under the Pasula standard. Sturgill did not testify that he would have fired Robinette fur his unprotected activities alone. Indeed, Sturgill did not testify that he would have fired him for any activities. The decision to discharge was made by Jack Tiltson, Respondent's Vice President, who did not testify at the hearing. Tiltson was told of the protected and unprotected activities, and it would be speculative on this record to decide whether or not he would have regarded the unprotected activities as sufficient grounds for discharge. There is no evidence of disciplinary action taken by Respondent involving like conduct in the past.

It is not enough that Robinette's work performance was less than exemplary. It is not enough that he "deserved" to be discharged, not enough that his unprotected activity was "a flagrant disregard of mine safety." Since I cannot accurately assess the extent to which his unprotected activity motivated the discharge, I must conclude that Respondent's burden has not been carried.

ORDER

I conclude on the basis of the whole record that Respondent has not established by a preponderance of the evidence that Robinette would have been discharged for unprotected activities alone.

Therefore my order of March 13, 1980 IS REAFFIRMED.

James A. Broderick

James A. Broderick
Chief Administrative Law Judge

Distribution: By certified mail.

Michael L. Lowry, Esq., Ford, Harrison, Sullivan, Lowry & Sykes, 1400 Harris Tower, 233 Peachtree St., N.W., Atlanta, GA

James H. Swain, Esq., Office of the Solicitor, U.S. Department of Labor, 14480-Gateway Bldg., 3535 Market St., Philadelphia, PA 19104

Special Investigation, MSHA, U.S. Department of Labor, 4015 Wilson Blvd., Arlington, VA 22203

Harrison Combs, General Counsel, United Mine Workers of America, 900 Fifteenth St., N.W., Washington, DC 20005

Thomas A. Mascolino, Esq., Associate Solicitor, U.S. Department of Labor, 4015 Wilson Blvd., Arlington, VA 22203